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No. 79-1176

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

CITY OF MEMPHIS, ET AL.,
Petitioners,
v.
N. T. GREENE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE AFFIRMATIVE ACTION COORDINATING CENTER THE NATIONAL CONFERENCE OF BLACK LAWYERS THE NATIONAL LAWYERS GUILD THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF RESPONDENTS

[continued on inside cover]

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT 3

ARGUMENT:

I. THE LEGISLATIVE HISTORY OF THE THIRTEENTH AMENDMENT AND OF SECTION 1982 AS WELL AS INTERPRETATIONS BY THIS COURT PRECLUDE A REQUIREMENT OF PROOF OF SPECIFIC INTENT TO DISCRIMINATE 4

II. THE COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT THE CLOSING OF WEST DRIVE IS A BADGE AND INCIDENT OF SLAVERY IN VIOLATION OF THE THIRTEENTH AMENDMENT AND SECTION 1982 11

A. One of the Specific Purposes of the Thirteenth Amendment Was to Provide Black Citizens Freedom of Movement and the Right to Reside at Locations of Their Own Choosing 11

B. The Official Reasons Given For Closing West Drive Are a Sophisticated Subterfuge For The Intent to Prevent and Dissuade Neighboring Black Residents From Entering Hein Park 13

TABLE OF CONTENTS—Continued

Page

III. PETITIONERS' RELIANCE ON *PALMER* v. *THOMPSON* IS MISPLACED AND RAISES ISSUES NOT PROPERLY BEFORE THIS COURT 16

CONCLUSION 18

APPENDIX:

A. Index of Amici 1a

B. Amici Statements of Interest 2a

TABLE OF AUTHORITIES

CASES: Page

Civil Rights Cases, 108 U.S. 3 (1883) 3, 7
Clark v. *Thompson*, 206 F. Supp. 539 (S.D. Miss. 1962), 313 F.2d 637 (5th Cir. 1963) 16
Greene v. *City of Memphis*, 610 F.2d 395 (6th Cir. 1979) 1, 4, 13, 14
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) 3, 4, 16
Palmer v. *Thompson*, 403 U.S. 217 (1971) 16, 17
Village of Arlington Heights v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977) 14
Washington v. *Davis*, 426 U.S. 229 (1976) 7, 10

CONSTITUTIONAL PROVISIONS:

Fourteenth Amendment to the United States Constitution ..... *passim*
Thirteenth Amendment to the United States Constitution ..... *passim*

FEDERAL STATUTES:

42 U.S.C. § 1982 ..... *passim*

CONGRESSIONAL DOCUMENTS AND REPORTS:

CONGRESSIONAL GLOBE, 38th Congress, 1st Session (1864) 5, 6, 10
GENERAL REGULATIONS CONCERNING COMMERCIAL INTERCOURSE, ABANDONED PROPERTY AND GENERAL WELFARE OF FREEMEN (No. 3, 38th Congress, 1st Session) 12
SENATE EXECUTIVE DOCUMENTS, PRELIMINARY REPORT TOUCHING THE CONDITION AND MANAGEMENT OF EMANCIPATED REFUGEES, MADE TO THE SECRETARY OF WAR BY THE AMERICAN FREEMEN'S INQUIRY COMMISSION (No. 53, 38th Congress, 1st Session) 12, 13

TABLE OF AUTHORITIES—Continued

Page

HOUSE MISCELLANEOUS DOCUMENT (No. 52, 40th Congress, 3rd Session) (Serial 1385) 13
HOUSE REPORTS (No. 22, 42nd Congress, 2nd Session) (Serial 1529-41) 13
SENATE REPORT (No. 1, 42nd Congress, 1st Session) 13
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Karst, THE SUPREME COURT—FOREWORD: EQUAL CITIZENSHIP UNDER THE FOURTEENTH AMENDMENT, 91 HARVARD LAW REVIEW 1 (1977) 8, 9
Kerner, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) 2
Kinoy, THE CONSTITUTIONAL RIGHT OF NEGRO FREEDOM, 21 RUTGERS LAW REVIEW 387 (1967) .. 3
Kinoy, THE CONSTITUTIONAL RIGHT OF NEGRO FREEDOM REVISITED: SOME FIRST THOUGHTS ON *Jones* v. *Alfred H. Mayer Co.*, 22 RUTGERS LAW REVIEW 537 (1968) 3

TABLE OF AUTHORITIES—Continued

Page

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INTEREST OF AMICI CURIAE

The grant of certiorari in *Greene* v. *City of Memphis*, 610 F.2d 395 (6th Cir. 1979) cert. granted, 48 U.S.L.W. 3726, (May 12, 1980), indicates that this Court has chosen to take advantage of a rare opportunity to in-

terpret the meaning of the Thirteenth Amendment to the U.S. Constitution. *Amici*, numerous civil rights, labor and community groups, all believe that the Thirteenth Amendment was designed to provide an effective remedy for the problem of race discrimination in the United States.

Amici have become increasingly concerned about the continuing, systematic race discrimination that exists throughout the country. They have also been attentive to the desperate and often violent responses by the victims of this discrimination. The prophecy, stated by the Report Of The U.S. Commission on Civil Disorders in 1968 [1], that the country was moving toward two separate and unequal societies, one white and one Black, has assumed contemporary relevance with the recent violent upheavels in Miami and the indications of a broadening economic, social and political gap between Blacks and whites.

This case raises the question of what exactly are the manifestations of racial discrimination in contemporary American society, and the extent to which the Courts, as guarantors of constitutional and statutory rights, can provide remedies for discriminatory action.

Amici see the case before the Court as one that presents issues that are crucial to the racial and ethnic fabric of this country, and that in essence, will go a long way toward determining the physical boundaries that will exist between Blacks and whites in the cities and suburbs of our nation. The sanctioning by this Court of the closing of West Drive may very well signal to white communities all over the country that municipal zoning power is available to physically exclude "undesirable elements", definable in racial terms, and thereby

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[1] Kerner, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, Bantam, New York, 1968, at 398.

create a virtually all white "oasis" in the midst of a rapidly deteriorating nether world.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

In *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), this Court provided a unique and expansive interpretation of the long dormant promises of the Thirteenth Amendment by recognizing the Congressional power to define the badges and incidents of slavery and to legislate against their existence.[2] That case stands for principles central to the issues presently before the Court.

Justice Stewart, in construing the legislative history of the Thirteenth Amendment, relied on the opinions in the *Civil Rights Cases*, 109 U.S. 3 (1883), in which Justice Bradley found that the Thirteenth Amendment was not restricted to the mere prohibition of discriminatory action:

> By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.

109 U.S. at 20.

In addition, Justice Bradley held that the Thirteenth Amendment has a "reflex character, establishing and declaring civil and political freedom throughout the United

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[2] Kinoy, THE CONSTITUTIONAL RIGHT OF NEGRO FREEDOM, 21 RUTGERS LAW REVIEW 387 (1967) and Kinoy, THE CONSTITUTIONAL RIGHT OF NEGRO FREEDOM REVISITED: SOME FIRST THOUGHTS ON *Jones* v. *Alfred H. Mayer Co.*, 22 RUTGERS LAW REVIEW 537 (1968).

States." *Id.* Moreover, the *Jones* Court realized that the amendment provided "Negro citizens, [in the] North and South, . . . freedom to 'go and come at pleasure' and 'to buy and sell when they please.'" 392 U.S. at 441. The Court concluded:

> Just as the Black codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

Id. at 441-443.

The opinion by Judge Engel for the Sixth Circuit Court of Appeals in *Greene II* properly interpreted the language of this Court in *Jones* and held that "the erection of the physical barrier between a historically all-white residential neighborhood and a predominantly Black neighborhood under the particular circumstances found . . . is precisely the type of badge which was the target of the Thirteenth Amendment and of Section 1982". *Greene* v. *City of Memphis*, 610 F.2d 395, 403 (6th Cir. 1979).[3]

In this brief, *amici* will argue that consideration must be given to the historical conditions that existed after the Civil War and the purposes that the framers of the amendment hoped to accomplish by securing passage of the Thirteenth Amendment and subsequently enacting Section 1982. When considered in this historical framework, the notion that discrimination does not amount to a "badge of slavery" unless the perpetrators so intended it

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[3] Amici rely on the facts as set forth in the opinion of the Sixth Circuit Court of Appeals.

to is sheer absurdity. The amendment was written to outlaw slavery and its incidents. Its force is not limited to a prohibition of the intention to enslave. *Amici* will then argue that the Court of Appeals for the Sixth Circuit was correct in its analysis and conclusion. The conduct complained of in this case, the closing of West Drive, amounted to a badge of slavery. The humiliation imposed on the Black community was similar to that historically visited on Blacks under slavery. The disparate effect of the street closing on the property values and houses in the white area versus those in the Black area violated the Thirteenth Amendment and the express provisions of Section 1982.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF THE THIRTEENTH AMENDMENT AND OF SECTION 1982, AS WELL AS INTERPRETATIONS BY THIS COURT PRECLUDE A REQUIREMENT OF PROOF OF SPECIFIC INTENT TO DISCRIMINATE.

The legislative history must be the starting point for any analysis of the Thirteenth Amendment and Section 1982. That history reveals that the framers designed the amendment to abolish slavery and all of its badges and incidents.

The intentions of the framers were unmistakable. In the words of Henry Wilson, veteran and eloquent abolitionist Senator from Massachusetts:

> If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading and bloody codes; its dark, malignant barbarizing spirit; all it was and is, everything connected with it or

> pertaining to it, . . . when this amendment to the Constitution shall be consummated, the shackle will fall from the limbs of the hapless bondsman . . . the schoolhouse will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance. Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom.[4]

Senator Harlan of Iowa elaborated on the necessary incidents of slavery that the amendment was designed to abolish. He specifically included the denial to slaves and their progeny of a lawful right to acquire and hold property, to sue, be sued or testify in court, or to speak, write, or publish freely.[5] As pointed out by tenBroeck:

> [T]he slavery which was within the reach of the amendment reached far beyond the personal burden of the slaves and the characteristics of immediate bondage. The Congressional debates repeated what the history of abolitionism had already . . . made abundantly clear. The free colored person, [in the] South and North . . . was only less degraded, spurned, and restricted than his enslaved fellow. His slavery as well as that of the 'hapless bondsmen' was to be abolished by the Thirteenth Amendment. . . .
>
> The slavery which was to be abolished by the Amendment [also] consisted of the incidents of the system . . . . [T]he Thirteenth Amendment was . . . . meant to be a direct ban against many of the evils radiat-

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[4] CONGRESSIONAL GLOBE, 38th Congress, 1st Session, at 1319, 1321, 1324 (1864).

[5] *See Id.* at 1439-1440.

ing out from the system of slavery as well as a prohibition of the system itself.[6]

This encapsulated discussion emphasizes two aspects of the framers' intentions. First, the framers clearly intended the Amendment to do more than simply free the slaves who were still in bondage at the time. Second, the framers understood the Amendment to carry absolute force. Nowhere do the debates reveal any language limiting the construction of the Amendment. An intent requirement, with its inevitable burden of proof problems, would limit the force of the Amendment into complete obliteration.

In *Washington* v. *Davis*, 426 U.S. 229 (1976), this Court required that purpose or intent to discriminate must be shown by a plaintiff who claims a violation of the Equal Protection Clause of the Fourteenth Amendment. An examination of this Court's rationale for that conclusion demonstrates that no similar conclusion can be reached in cases under the Thirteenth Amendment.

The foundation for the Court's decision in *Washington* was a finding that "the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race". *Id.* at 239.

In contrast, the Thirteenth Amendment, from its inception, has been interpreted as having a decidedly different purpose. In the *Civil Rights Cases*, *supra*, the majority of this Court opined that the Amendment was intended to be used "for the obliteration and prevention of slavery with all its badges and incidents". *Id.* at 20. The Court went on to declare that "the [13th] Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that

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[6] tenBroeck, THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, 39 CALIFORNIA LAW REVIEW 171, 180 (1951).

slavery or involuntary servitude shall not exist in any part of the United States". *Ibid.* This established that the Thirteenth Amendment was aimed at the eradication of certain objective conditions—slavery and its badges and incidents—unlike the Fourteenth Amendment, which is designed to prevent discriminatory governmental conduct.

Since the purpose of the Thirteenth Amendment is the eradication of certain objective conditions—slavery and its badges—a Thirteenth Amendment violation requires only proof that these conditions exist. Intentions are irrelevant in the inquiry of whether an action has produced a badge of slavery. Any badge of slavery is absolutely prohibited by the Thirteenth Amendment.

Writing in the *Harvard Law Review*, Kenneth Karst identified this difference between general equal protection classifications and race related discrimination:

> "When the context is race, the problem of the stigma of caste cannot be confined to purposeful stigmatizing action. It is a global problem, this inheritance from slavery and the system of racial subordination that took slavery's place . . . Racism, 1970's style, is a living system, just as Jim Crow was a system. The main difference between the two systems is that today's racism inflicts a greater part of its harms unthinkingly. One who is stumbled over often enough may, understandably, notice that these cumulative impacts bear a certain functional resemblance to kicks.
>
> If we were talking about some new form of discrimination—say, discrimination against persons with red hair, or discrimination against whites—then the purpose doctrine would make sense, as would its corollary view that stigmatic harm can result only when there is a purpose to cause it. But in America today, where the problem of racism is the problem of eliminating a long established stigma of inferiority—that is, a day-to-day assumption by many

> among us that some of our citizens are not quite persons—it is quite plain as a cattle prod that we are talking about something quite different. A legislature oblivious to this existing stigma of caste will nonetheless reinforce the stigma when it produces racially discriminatory effects through ostensibly 'neutral legislation.' [7]

This concept of institutionalized racism has also found substantial support in social science literature.[8]

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[7] Karst, THE SUPREME COURT—FOREWORD: EQUAL CITIZENSHIP UNDER THE FOURTEENTH AMENDMENT, 91 Harvard Law Review 1, 50-51 (1977).

[8] The following definition has been provided for institutional racism: "Institutional racism refers to the structure of inequality: 1) reflected in the racially based differential allocation of status, privileges, and material rewards in numerous institutional sectors; and 2) shaped by the historically precipitated and currently persisting process of subordination whose mechanisms primarily involve the routine imposition of conventional norms by often unprejudiced role players in the various institutional sectors in a way that, though covert and usually unintentional, produces racially relevant consequences" from "Institutional Racism: A Perspective in Search of Clarity and Research" by Benokraitis and Feagin, in BLACK, BROWN, WHITE RELATIONS IN THE 70's, edited by Willie and and Hamilton, Transaction Books, New Jersey, 1977, at 133. See also, Knowles and Prewitt, eds., INSTITUTIONAL RACISM IN AMERICA, Prentice Hall, New Jersey, 1969, at 5; Sanders, BLACK PROFESSIONALS' PERCEPTIONS OF INSTITUTIONAL RACISM IN HEALTH AND WELFARE ORGANIZATIONS, R.E. Burdick, New Jersey, 1972, at 28; Yetman and Steel, eds., MAJORITY AND MINORITY: THE DYNAMICS OF RACIAL ETHNIC RELATIONS, Allyn and Bacon, Massachusetts, 1971, at 363; Skolnick, THE POLITICS OF PROTEST, Ballantine, New York, 1969, at 180; Jones, PREJUDICE AND RACISM, Addison Welsey, Massachusetts, 1972, at 131; Carmichael and Hamilton, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA, Random House, New York, 1967, at 4; Blauner, RACIAL OPPRESSION IN AMERICA, Harper and Row, New York, 1972, at 187-188; United States Commission on Civil Rights, RACISM IN THE UNITED STATES AND HOW TO COMBAT IT, U.S. Gov't. Printing Office, Washington, D.C., 1970, at 10-11.

The point of this research is clear. Race discrimination in contemporary America has become a highly sophisticated phenomenon. A great deal of the race discrimination experienced by racial minorities cannot be traced directly to the malicious intentions of individuals. Nonetheless, it is still race discrimination. Its impact on affected minorities is in no way diminished by the absence of acknowledged bigots.

To require proof of an intention to discriminate when plaintiffs are asserting claims alleging deprivation of constitutional rights raises two critical points. First, many cases will require plaintiffs to prove something that may not exist in any way susceptible of verification. Second, in cases where malicious motives are in fact present, the requirement would signal those intending racial discrimination to disguise their motivations by building a record in which their racial discriminatory intent is hidden.

The concerns expressed by the Court in *Washington* v. *Davis, supra,* have no place in this case. Unlike the Fourteenth Amendment, which provides a general guarantee of equal protection of the laws, the Thirteenth Amendment created a new, national, Constitutional right of Black emancipation from slavery and any stamp of inferiority imposed by its badges and incidents. The Thirteenth Amendment is unquestionably race-specific. The intention of the framers was to raise the status of slaves to the level of whites.[9] As a Constitutional right, the Thirteenth Amendment requires affirmative protec-

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[9] Cf. The statement of Walter D. Kelly of Pennsylvania at the time of the Amendment's adoption: "This proposed amendment is designed to accomplish the very purpose with which they charged us in the beginning, namely, the abolition of slavery in the United States, and the political and social elevation of Negroes to all the rights of white men." Congressional Globe, 38th Congress, 1st Session, at 2987.

tion and preservation by national power, including the federal courts. All branches of the federal government have a duty to ban all badges and incidents of slavery that perpetuate racial inferiority.

Against the sordid landscape of this nation's entire racial history, any action that disproportionately disadvantages Blacks must be recognized indisputably as a badge and incident of slavery in direct violation of the prohibition of the Thirteenth Amendment. This is particularly true in cases raising questions about housing discrimination since this area remains the lynchpin in the maintenance of the institutional racism permeating American society.

II. THE COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT THE CLOSING OF WEST DRIVE IS A BADGE AND INCIDENT OF SLAVERY IN VIOLATION OF THE THIRTEENTH AMENDMENT AND SECTION 1982.

A. One of the Specific Purposes of the Thirteenth Amendment Was to Provide Black Citizens Freedom of Movement and the Right to Reside at Locations of Their Own Choosing.

The framers of the Thirteenth Amendment were well aware that white hostility could and would lead to overt and covert attempts to keep Blacks out of certain communities. The concern was not ill-placed. Formal and informal practices excluding Blacks from virtually all choices in housing were widespread.[10] The problems con-

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[10] Cf., Berlin, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTE-BELLUM SOUTH, Vintage, New York, 1976, at 256, 257, wherein reference is made to white resistance to living near free Blacks in the ante-bellum South; Wilson, THE BLACK CODES OF THE SOUTH, University of Alabama Press, Tuscaloosa, 1965, on attempts to bar Blacks from cities and to keep them tied to the land in the early post-bellum era; DuBois, BLACK RECONSTRUCTION IN

cerning the living patterns of the newly freed slaves were exacerbated by the existence of the Black Codes, which were designed to maintain semi-slavery by keeping Blacks tied to rural lands as sharecroppers and away from the cities.

Substantial and detailed concern was given to where the newly freed slaves would live. James Harlan of Iowa, one of the key architects of the Thirteenth Amendment, emphasized that the amendment would give Blacks the right to own their own property, as well as to protect and advance their property rights by bringing suits, testifying in court, and speaking and writing freely.[11] Thus, the abolition of slavery contained in the Thirteenth Amendment was designed to accord Blacks the right of "personal freedom without distinction". Included within this "personal freedom was the right to own and protect property".[12]

The Thirteenth Amendment and Section 1982 were also designed to curtail the unbridled activities of newly born terrorist groups, like the Ku Klux Klan, which attempted to adversely affect Black property rights. Congressional reports and documents leading up to the passage of the Thirteenth Amendment are replete with concern over this lamentable state of affairs. There is no doubt that the anti-slavery Amendment and legislation based on it were designed to reverse the situation.[13] The right of

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AMERICA, Russell & Russell, New York, 1935, at 177, on efforts to bar Blacks from renting or living in certain areas in the early post-bellum era.

[11] Belz, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN'S RIGHTS, 1861-1866, Greenwood Press, Connecticut, 1976, at 118-19.

[12] *Ibid.*

[13] General Regulations Concerning Commercial Intercourse, Abandoned Property and the Employment and General Welfare of Freedmen (No. 3, 38th Congress, 1st session); Senate Executive

Blacks to protect the value of their property therefore must be addressed by the Court in this case since, as was acknowledged by the Court of Appeals, the act of closing West Drive detrimentally affected the property values of the residents of the nearby Black community, while simultaneously enhancing those of the white community. 310 F.2d at 404.

B. The Official Reasons Given For Closing West Drive Are A Sophisticated Subterfuge For The Intent To Prevent And Dissuade Neighboring Black Residents From Entering Hein Park.

The official reasons given by the Hein Park Civic Association in support of their application for closing West Drive were (1) to reduce the traffic; (2) to increase the safety of children within the subdivision; and (3) to reduce noise, litter, and interruptions in community life. See Brief of Hein Park Civic Association, *Amicus Curiae* in support of the petitioners, at 10.

Nonetheless, the Court of Appeals took notice of the District Court finding that

> the closing was not connected to any uniform city planning effort, directed generally to the preservation of neighborhoods throughout the city; and instead it appears to have been a unique step to protect one neighborhood from *outside influence* which the residents considered *undesirable.* (emphasis added).

610 F.2d at 404.

Documents, Preliminary Report Touching the Condition and Management of Emancipated Refugees, Made to the Secretary of War by the American Freedmen's Inquiry Commission (No. 53, 38th Congress, 1st session); Senate Report (No. 1, 42nd Congress, 1st session); Senate Reports (No. 41, 42nd Congress, 2nd session) (serial 1484-96); House Reports (No. 22, 42nd Congress, 2nd session) (serial 1529-41); House Miscellaneous Document (No. 52, 40th Congress, 3rd session) (serial 1385).

The Sixth Circuit Court of Appeals concluded that the closing of West Drive would bring about the same result prohibited in *Jones*,

> "[the] herd[ing] of men into ghettos, and mak[ing] their ability to buy property turn on the *color of their skin.*" (emphasis added).

610 F.2d at 404.

Petitioners seek to cloak the discriminatory effect of their actions by attempting to focus the inquiry on local land use regulation. See, Brief for Petitioners, at 32-35. The contention that the closing of West Drive is simply a liberal exercise of local power over land use did not blind the Court of Appeals and should not blind this Court to the racial significance of the action. The Thirteenth Amendment mandates that traditional deference cannot be given to governmental actions that create and/or perpetuate badges or incidents of slavery. Irrespective of the intent of the actors, and as the District Court and the Court of Appeals found, the barrier clearly establishes a racially segregative line of demarcation.

Ordinarily, proper deference is given municipalities to allow them to "weigh competing values" in making their official decisions. However, when governmental action is "arbitrary and irrational," the Court's usual deference to municipal autonomy should give way to an inquiry to insure the constitutionality of the results. One indication of arbitrary governmental action, pointed out by this Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), is where the result is a "substantive departure" from the norm.

The facts of this case amply support the conclusion that the action of the Memphis Planning Commission was irrational and arbitrary, since it was a substantive de-

parture from the past actions of that body. Although many side streets or alleys, seldom used by other than a few local residents had been closed by the Commission, the closing of West Drive was a departure from this pattern. West Drive is used extensively by people from all parts of the city and is a major thoroughfare, not merely a sidestreet, which provides direct access to downtown and other popular areas of the city, *e.g.*, a park, zoo, aquarium, arts council, art gallery, theatre, children's playground and wading pool, golf course, soft ball fields and public schools.

The closing of this street, despite the protest of hundreds of citizens who would be affected adversely by it, effectively deprives all but a few select white Memphis residents of the use of this street.

In fact, West Drive and Springdale Avenue are but one single street.[14] Any rational consideration of problems associated with one should necessarily consider the problems of the other. The record indicates clearly that only the needs of and effects on the white neighborhood of Hein Park were considered. The closing of West Drive will obviously benefit the predominantly white residents of Hein Park with increased property values, decreased traffic and its noise, and a sense of racial superiority and isolation at direct expense to the predominantly Black residents in the adjacent neighborhood north of Hein Park who will suffer decreased property values, increased traffic and its noise, and a sense of racial inferiority and exclusion. It is all too obvious that no government body properly representing the interest of all Memphis residents could have opted rationally to allow the closing of West Drive.

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[14] See, Map, Appendix to Brief of Hein Park Civic Association, *supra*.

III. PETITIONERS' RELIANCE ON *PALMER* v. *THOMPSON* IS MISPLACED AND RAISES ISSUES NOT PROPERLY BEFORE THIS COURT.

Petitioners seek to confuse the crux of the main issue before this Court with an erroneous and a disingenuous interpretation of the basis for the Sixth Circuit Court of Appeals opinion. The decision of this Court in *Palmer* v. *Thompson*, 403 U.S. 217 (1971) is not applicable since the Court of Appeals decision in this case is based on a proper interpretation of the integral, historic relationship between the Thirteenth Amendment and Section 1982. The issue of the self-executing force of the Thirteenth Amendment is therefore not before this Court.

In *Clark* v. *Thompson*, 206 F. Supp. 539 (S.D. Miss. 1962), 313 F. 2d 637 (5th Cir.), *cert. denied*, 375 U.S. 951 (1963), the Federal District and Circuit Courts declared that the enforced segregation by Jackson, Mississippi, in the operation of public parks, swimming pools, golf links, and other public facilities, like an auditorium and the city zoo, was a denial to Blacks of the Equal Protection of the Laws. However, neither Court would issue an injunction and this Court declined certiorari. Jackson did desegregate voluntarily all of its public facilities except the municipal swimming pools, which were simply closed. A second suit, *Palmer* v. *Thompson*, *supra*, was then brought by Black residents to compel the city to reopen the swimming pools and to operate them on an integrated basis. In a five to four opinion, this Court declined to order the reopening of the pools.

Unlike *Palmer* v. *Thompson*, *supra*, which was brought solely on the basis of the Thirteenth and Fourteenth Amendments, this case is based on Section 1982 and the Thirteenth Amendment. *Jones*, *supra*, established that Section 1982 is an independent right of action barring "all racial discrimination, private as well as public, in the sale or rental of property" and "is a valid exercise of the

power of Congress to enforce the Thirteenth Amendment." 392 U.S. at 412-413. A violation of Section 1982 therefore provides ample Congressional authority for appropriate judicial action. Contrary to the inference raised by petitioners, this Court is not being asked to create new law. It is merely being asked to interpret and enforce existing federal law—a function well within the judicial role. This Court should have no difficulty concluding that governmental action resulting in diminished property values for Blacks, while increasing those of whites, constitutes a badge and incident of slavery in restraint of the fundamental right of Blacks to buy and own property.

Palmer is also distinguishable on the facts. The entire municipal pool system had been closed at the time the suit was filed. All Jackson residents, Black and white, were deprived of the use of public pools. This is not the situation with the closing of West Drive. Not only do the white residents of Hein Park retain the use of West Drive, but they do so under enhanced conditions. At the same time, the Black residents of the adjacent neighborhood to the North of Hein Park are effectively cut off from the use of West Drive under clearly detrimental conditions.

CONCLUSION

Amici are not unmindful that this is the fourth case, in as many terms, raising serious questions about American race relations, in which they have offered their humble guidance. During this period, despite our many hopes, America's racial problems have grown increasingly complex and serious. At the same time, there has been a rapid rise in the pervasive unwillingness of the American people and their institutions to address, much less attempt to resolve, any of these problems.

West Drive and Springdale Avenue are a single street. If this Court permits the closing of West Drive, such a decision may well imply judicial acquiescence, in form and fact, to two separate and unequal American societies, one white and one Black. A society purporting to cherish both domestic tranquility and the rule of law will have neither when it continues to deny the protection of the law to its Black citizens. A dissent by Associate Justice Thurgood Marshall in a recent decision by this Court best stated the implications:

> It is time to realize that manipulating doctrines and drawing improper distinctions under the . . . [Civil War] Amendments, as well as under Congress' remedial legislation enforcing those Amendments, make this Court an accessory to the perpetuation of racial discrimination. The . . . requirement of proof of 'intentional discrimination', . . . may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious. If so, the superficial tranquility created by such measures can be but short-lived. If this Court refuses to honor our long-recognized principle that the Constitution 'nullifies sophisticated as well as simple minded modes of discrimination', . . . it cannot expect the victims of discrimination to respect political [or judicial] channels of seeking redress.

City of Mobile, Ala. v. *Bolden*, —— U.S. ——, ——, 100 S.Ct. 1490, 1540 (1980).

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

INDEX OF AMICI

	Page
Affirmative Action Coordinating Center	2a
National Conference of Black Lawyers	2a
National Lawyers Guild	3a
Center for Constitutional Rights	3a
Associated Students of Colorado State University	4a
Black American Law Students' Association	4a
Center for Law and Education	4a
Civil Rights-Civil Liberties Research Committee of Harvard Law School	4a
Community Law Center of Santa Fe, New Mexico	4a
Federation of Southern Cooperatives	4a
Harambi Student Union of North Carolina Central University	4a
Labor Research Association	4a
Law Students Civil Rights Research Council	4a
Liberation News Service	4a
Minority People's Council on the Tennessee-Tombigbee Waterway	4a
National Alliance Against Racist and Political Repression	4a
National Child Labor Committee	4a
Panamerican-Panafrican Association	4a
People's Settlement Association	4a
Prisoner's Rights Organized Defense	4a
Schenectady Community Action Program	4a
Southern Christian Leadership Conference	4a
Southern Poverty Law Center	4a
Southern Regional Council	4a
Small Tribes Organization of Western Washington	4a
Union W.A.G.E.	4a
Women for Racial and Economic Equality	4a
Women's Institute for Freedom of the Press	4a

AMICI STATEMENTS OF INTEREST

The *Affirmative Action Coordinating Center* (AACC) is an organization created by the National Conference of Black Lawyers (NCBL), the Center for Constitutional Rights (CCR), and the National Lawyers Guild (NLG), with the participation of a cooperating network of civil rights, civil liberties, and other organizations. Many network organizations as well as other groups have joined as *amici* in this brief. The AACC, in all of its work, has stressed the importance of the 13th Amendment as the basis for affirmative action, hence our interest in this case.

The AACC was formed in response to the proliferation of attacks on affirmative action programs. Its purposes are to stimulate and coordinate resources and legal strategies for the defense and expansion of affirmative action programs. The AACC has convened roundtables of civil rights, labor and women's rights attorneys to discuss the *Weber* and *Bakke* cases.

AACC publishes an informational newsletter entitled AACC News. It is preparing several educational publications on affirmative action in education and employment. The AACC has conducted and is planning other activities designed to increase communications and enhance joint efforts by all groups and individuals interested in strengthening effective affirmative action programs.

The *National Conference of Black Lawyers* (NCBL) is an activist legal organization of Black lawyers, law professors, judges and law students dedicated to serving as the legal arm of the Black community. Since its inception in 1968, NCBL has been actively involved in the continuing struggle for equal employment opportunity. Over the past five years, NCBL has been a leader in the battle against the growing concept of "reverse discrimination." NCBL strongly believes that the adoption of the

principle of reverse discrimination by the courts and the continued attacks on affirmative action plans, as in *Bakke*, *Weber*, and *Fullilove*, represent a rejection of the nation's professed commitment to equality of opportunity. Without the power of Congress to enact legislation to eliminate the effects of 400 years of institutional discrimination, the goal of racial equality will continue to be a commitment with form but no substance.

The *National Lawyers Guild* was founded in 1937 as a multi-racial and progressive alternative to the racially restrictive and conservative American Bar Association. It's commitment to civil rights dates back to efforts to eliminate the poll tax and white primaries. In 1962, the Guild dedicated it's full resources to the legal support of the civil rights movement. In support of affirmative action, the Guild filed briefs as *amicus curiae* throughout the course of the *Bakke* litigation and in 1977, joined with the NCBL to cosponsor a *Bakke amici* roundtable attended by forty organizations.

The *Center for Constitutional Rights* (CCR) was born of the civil rights movement and the struggle of Black people in the United States for true equality. CCR attorneys have been active in cases involving voting rights, jury composition, community control of schools, fair housing and employment discrimination. Through litigation and public education, they have worked to protect and make meaningful the constitutional and statutory rights of women, Blacks, Puerto Ricans, Native Americans and Chicanos.

The *Associated Students of Colorado State University*, the *Black American Law Students' Association*, the *Center for Law and Education* of Cambridge, Massachusetts, the *Civil Rights-Civil Liberties Research Committee of Harvard Law School*, the *Community Law Center of Santa Fe, New Mexico*, the *Federation of Southern Cooperatives*, the *Harambi Student Union of North Carolina Central University*, the *Labor Research Association, Law Students Civil Rights Research Council, Liberation News Service, Minority People's Council on the Tennessee-Tombigbee Waterway, National Alliance Against Racist and Political Repression, National Child Labor Committee*, the *Panamerican-Panafrican Association, People's Settlement Association, Prisoner's Rights Organized Defense, Schenectady Community Action Program, Southern Christian Leadership Conference* (SCLC), *Southern Poverty Law Center, Southern Regional Council, Small Tribes Organization of Western Washington, Union W.A.G.E., Women for Racial and Economic Equality* (WREE), and *Women's Institute for Freedom of the Press*, national and local organizations which have joined the AACC as *amici curiae* in this brief, represent many sections of American society and have many diverse interests. They share a mutual hope that the Court will use the instant case to advance and not to set back the struggle to rid our nation of the haunting spectres of racial discrimination and racial hatred. These groups share a common concern about the continuing exclusion of minorities from the mainstream of housing opportunities that is the legacy of slavery and discrimination. They are aware that the present case may well determine whether this exclusion will become overtly intractable or whether the mandate of the Thirteenth Amendment will be enforced finally.